

# Advisory Opinion 2025-01

Issued on February 6, 2025, by

The West Virginia Ethics Commission

## Opinion Sought

A **County Commission** asks whether it may approve the Sheriff's request to hire his father, who was the former sheriff, as a chief deputy, given that his father participated in creating the chief deputy position when he was the sheriff.

## Facts Relied Upon by the Commission

The new Sheriff has asked the County Commission, the Requester, to approve the hire of the Sheriff's father into a newly created position - chief administrative deputy. The Requester states that the County Commission and the Sheriff's Department are co-employers of the sheriff deputies and that the County Commission must approve payroll changes, such as the new employment or change in employment of a deputy.

The Requester asserts that an internal flowchart created by the new Sheriff shows that he intends to have six chief deputy positions in the Sheriff's Department, each overseeing distinct areas of the Sheriff's Department, such as law enforcement, administration, tax, and security. The Requester believes that, based on the flowchart, the Sheriff intends to have the other five chief deputies report directly to the chief administrative deputy, having only the chief administrative deputy report directly to the Sheriff.

The Requester asserts that the former sheriff developed the job description for the new position of chief administrative deputy while he was serving as sheriff. The Requester also asserts the former sheriff created the position and applied for the position while he was still the sheriff. After the current Sheriff won the election in November (and before he took Office), he directed that the position of chief administrative deputy be posted and advertised. The Sheriff asked the county prosecutor to form an independent interview committee to conduct the interviews of the (two) applicants, since the Sheriff's father was one of the applicants. After the interviews, the hiring committee recommended the Sheriff's father for the job, and the Sheriff has asked the County Commission to approve a payroll change making the former sheriff the chief administrative deputy. The Requester does not believe the Sheriff lives with or is financially dependent on his father.

## Provisions Relied Upon by the Commission

[W. Va. Code § 6B-2-3](#) states, in relevant part:

- (a) A person subject to the provisions of this chapter may make application in writing to the Ethics Commission for an advisory opinion on whether an

action or proposed action violates the provisions of this chapter or the provisions of section fifteen, article ten, chapter sixty-one of this code and would thereby expose the person to sanctions by the commission or criminal prosecution. The commission shall respond within thirty days from the receipt of the request by issuing an advisory opinion on the matter raised in the request. . . .

[W. Va. Code § 6B-2-5\(b\)](#) states, in relevant part:

(1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. . . .

(4) A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides. . . .

[W. Va. Code R. § 158-6-3](#) (2022) states:

3.1. As used in this section, the term “nepotism” means favoritism shown or patronage granted in employment or working conditions by a public official or public employee to a relative or person with whom the public official or public employee resides.

3.2. As used in this section, the term “relative” means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law.

3.3. As used in this section, the term “supervise” or “supervision” means reviewing, auditing or evaluating work, or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline, or related matters.

3.4. Nepotism constitutes improper use of office for private gain.

3.5. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.6. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public

employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.6.1. A public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides unless required by law and an independent third party is involved in the process.

3.6.2. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

3.6.3. A public official or public employee may not use a subordinate as an independent third party required by subdivision 3.6.1 of this section. This prohibition does not apply to an elected public official who may not lawfully delegate powers of his or her office (for example, a sheriff, county assessor, or county clerk).

3.7. A public official may not vote on matters affecting the employment or working conditions of a relative or person with whom the public official resides unless such relative or person is a member of a class of five or more similarly situated persons affected. For a public official's recusal to be effective, he or she must excuse himself or herself from participating in the discussion and decision-making process by physically removing himself or herself from the room during the period in which the matter is under consideration, fully disclosing his or her interests, and recusing himself or herself from voting on the issue.

3.8. Certain county public officials and local board of education officials and employees are subject to the stricter limitations in W. Va. Code § 61-10-15. Other provisions in the Code or a public agency's own policies, rules, regulations, ordinances, or charters may further limit or prohibit the hiring of a relative or a person with whom a public official or employee resides.

[W. Va. Code § 6B-2-5\(d\)\(1\)](#) states, in relevant part:

In addition to the provisions of § 61-10-15 of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control. . . *Provided*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body. . . .

[W. Va. Code § 61-10-15\(a\)](#) states, in relevant part:

It is unlawful for any. . . county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control. . . .

### **Advisory Opinion**

The Ethics Commission acknowledges that, in order to respond to this request by the County Commission, an analysis of the conduct of another public official, the former sheriff, is required. Therefore, the Commission will first address whether it has the authority to issue an advisory opinion in this instance. W. Va. Code § 6B-2-3(a) provides:

A person subject to the provisions of this chapter may make application in writing to the Ethics Commission for an advisory opinion on whether an action or proposed action violates the provisions of this chapter or the provisions. . . [61-10-15] of this code and would thereby expose the person to sanctions by the commission or criminal prosecution.

County Commissioners are subject to the Ethics Act and W. Va. Code § 61-10-15, and the Ethics Commission has sanctioned public officials in the past for participating in or ratifying another public official's violation of the Ethics Act. See, for example, [Advisory Opinion 1997-30](#), in which the Commission held that a town recorder was prohibited from issuing payment for services under a contract that she knew to be in violation of the Ethics Act. Also, the Ethics Commission found that council members who vote to approve knowingly illegal payments may also violate the Act. *Id.* In [Advisory Opinion 2019-24](#), the Commission held that a town council may not approve and pay an invoice submitted by the previous mayor's wife if the previous mayor made, participated in making, or in any way attempted to use his office to influence the town's decision with respect to his wife's work.<sup>1</sup>

Accordingly, the Ethics Commission finds that the County Commission members' actions of approving the hire of the former sheriff "is an action or proposed action" that may violate the Ethics Act and W. Va. Code § 61-10-15, and "expose them to sanctions under the Ethics Act or W. Va. Code § 61-10-15." *Id.*

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<sup>1</sup> Further in [Advisory Opinion 1995-44](#), the Commission noted that the West Virginia Supreme Court of Appeals held, in *Hunt v. Allen*, 53 S.E.2d 509 (1948), that county officials who voted to pay for goods known to have been sold to the board by another member in violation of 61-10-15, were guilty of official misconduct and subject to removal from office, even though they had no personal financial interest in the purchases voted upon. In that opinion, the Ethics Commission had to determine whether a fellow Commissioner's private employer may be hired as a contractor or subcontractor for a commission project.

**Therefore, the Ethics Commission holds that it has the authority to issue this advisory opinion to the County Commission. The Ethics Commission does not have the authority under W. Va. Code § 6B-2-3(a) to determine as a matter of fact or law in an advisory opinion whether the former sheriff violated the Ethics Act or W. Va. Code § 61-10-15. Such an adjudication can only be made through the Ethics Act's complaint process found in [W. Va. Code § 6B-2-3 and 4](#).**

#### *Private Gain*

The Ethics Commission will now consider whether the alleged conduct of the former sheriff as asserted by the Requester would have violated the Ethics Act's private gain provision. In [Advisory Opinion 2016-18](#), the Commission held that a prosecutor may not hire the outgoing former prosecutor to serve as a special prosecutor in a position that was funded by a grant that the former prosecutor assisted the county in obtaining. This holding was due to the outgoing prosecutor's involvement in the grant application process. The former prosecutor was the co-sponsor, along with a local nonprofit organization, of the application for a United States Department of Justice grant. The job position description was prepared by the chief deputy in his office that was part of the grant application. The Ethic Commission found that the former prosecutor's employment in the position would violate the Ethics Act, W. Va. Code § 6B-2-5(b).

The asserted facts in this case are similar to those in Advisory Opinion 2016-18. The Requester here asserts that the former sheriff developed the job description and position of chief administrative deputy while he was serving as sheriff. The Requester asserts the former sheriff created the position knowing that he would apply for the position after his term as sheriff expired. **Based on the Requester's asserted facts, the Commission finds that the County Commission members would violate the Act's private gain provision if they approve the hire of the former sheriff.**

#### *Prohibited Contract*

The Ethics Act, at W. Va. Code § 6B-2-5(d)(1), and W. Va. Code § 61-10-15 prohibits certain county public officials and employees from having a pecuniary interest in public contracts over which they exercise control. The Ethic Act, however, has an exception for governmental employment. [Advisory Opinion 2005-13](#).

W. Va. Code § 61-10-15 imposes criminal penalties against certain county officials, including sheriffs, who become pecuniarily interested in the proceeds of a contract over which the official may exercise voice, influence, or control. Unlike the Ethics Act, W. Va. Code § 61-10-15 does not contain an exception for governmental employment. In [Advisory Opinion 2013-15](#), the Ethics Commission held that a county commission could not provide additional compensation to the sheriff's chief deputy for performing additional job duties as the county's 911 director. The chief deputy was the former sheriff. The Ethics Commission concluded that W. Va. Code § 61-10-15 prohibited the former Sheriff from receiving additional compensation because he exercised voice, influence, and control over the memorandum of understanding which formed the basis, in part, for his dual service as chief deputy and 911 director. Further, in [Advisory Opinion](#)

[2005-13](#), the Ethics Commission ruled that a prosecutor may not receive additional compensation under a grant awarded to the county because the prosecutor exercised voice, influence, or control over the decision of the county relating to the additional compensation.<sup>2</sup>

**Hence, the Ethics Commission holds that, based on the facts asserted by the Requester, W. Va. Code § 61-10-15 prohibits the County Commission from hiring the former sheriff as a chief deputy sheriff given the former sheriff's participation in creating the chief deputy position.**

### *Nepotism*

The nepotism restrictions, in W. Va. Code § 6B-2-5(b)(4) and W. Va. Code R. § 158-6-3 (2022), do not bar a public official's relative from being employed with the public agency so long as the nepotism provision in the Ethics Act and the Legislative Rule above are followed.<sup>3</sup> The Commission has recently rendered three advisory opinions that deal with elected public officials hiring an adult son or daughter. The Commission held in [Advisory Opinion 2021-20](#) that a sheriff's son may be employed as the director of courthouse security when the sheriff delegated the responsibility for the hiring and supervision to his chief deputy. In [Advisory Opinion 2022-03](#), the Ethics Commission held that a city council member's son may serve as the city's municipal judge, but that the council member may not participate in or vote on matters affecting his son's employment or working conditions, unless the matter would affect the son as a member of a class of five or more similarly situated individuals. In [Advisory Opinion 2023-11](#), the Commission found that an elected prosecutor may employ spouses as assistant prosecutors as long as the Act's nepotism provision and the applicable Legislative Rule are followed. In that opinion, the assistants would have worked independently of each other.

The instant situation is different from the above opinions because the Requester asserts that the current Sheriff has been involved in the hiring process of his father and would directly supervise his father if he is hired. The nepotism rule offers some leeway to elected public officials, including sheriffs, in [W. Va. Code R. § 158-6-3.6.1](#) (2022), which states: "A public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides unless required by law and an independent third party is involved in the process." The Rule expressly allows a sheriff to use a subordinate as the independent third-party. *Id.* at 3.6.3. **Therefore, if the Sheriff's father is ever hired to work in the Sheriff's Department, the Sheriff would have to involve a third party in all of his decisions concerning the employment and working conditions of his father.**

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<sup>2</sup> In Advisory Opinion 2016-18, discussed above, the Commission also found a violation of 61-10-15.

<sup>3</sup> As the Commission pointed out in Advisory Opinion 2022-08: "It is the duty of the Commission to apply the provisions of the Act and Rule. Neither the Act nor the Rule prohibits voting based on a fiduciary duty, the appearance of impropriety, the mere possibility of a breach of the confidentiality provision. . . or a potential violation of the private gain provision."

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules.*

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe,  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission